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MICHAEL RODAK, JR.

No. 71-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PEARCE JOHNSON, ET AL
Petitioners,

v.

ROGERS C. B. MORTON, ET AL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS AND MEMORANDUM IN OPPOSITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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Pearce Johnson, Don Kennard, Ben Atwell and Peyton Walters ("Petitioners") hereby reply to: (1) "Memorandum for the United States in Opposition" ("U. S. Memorandum"); (2) "Brief for Mrs. Sam Wilson, Jr. in Opposition" ("Wilson Brief"); and (3) "Brief for Respondents in Opposition" ("State Brief").

I. REPLY TO U. S. MEMORANDUM

On pages 1-2 of the U. S. Memorandum, Respondents state that the Texas Parks and Wildlife Commission with Petitioner Johnson dissenting "approved the acquisition" of Mustang Island for a state park. On page 2, they state that "Petitioner Johnson was simply outvoted on the Texas Parks and Wildlife Commission." In footnote 2 on

Page 3, they again say that "the state had approved the acquisition of Mustang Island."

None of these statements can go unchallenged because they are simply untrue and not supported by the Record. In discussing the State Law Issues in this case, the trial court noted:

> "Because of the disposition made of the federal issues in this case, it is unnecessary to proceed to the various issues of state law presented by the complaint, and this Court expressly declines to rule upon them. However, in the opinion of this Court, the evidence at the hearing is sufficient to fully substantiate plaintiffs' contentions that the application for BOR funds submitted by Commissioners Jersig and Gilvin and the contracts of sale with Mrs. Wilson *were not official acts of the Parks and Wildlife Commission*." (Pet. App. D, pp. D27-D28. Emphasis added.)

II. REPLY TO WILSON BRIEF

In Wilson's Brief, the following statements are made which are not supported by *any* evidence in the Record herein:

1. "The Attorney General *has* formally ruled that the contract to purchase Mustang Island is a valid and binding obligation of the State of Texas." (Wilson's Brief, p. 7).
2. ". . . Johnson has no special interest in his *former* official capacities . . . Smith has replaced Petitioner Johnson as Chairman of the Parks & Wildlife Commission and as State Liaison Officer)." (Wilson's Brief, pp. 7-8)
3. "As Chairman of the Commission Johnson was simply outvoted by the other two Commissioners." (Wilson's Brief, p. 8)
4. "Petitioner Johnson was outvoted in this instance." (Wilson's Brief, p. 11).

In addition, Wilson's Brief attempts to convey the impression that the State Liaison Officer is merely an administrative convenience of the Secretary of the Interior and his agents in BOR. This contention was considered and rejected by the Trial Court because it conflicts with the express provisions of the BOR Manual and with the practices consistently followed by the BOR until the filing of this lawsuit. (Pet. App. D, pp. D25-D26).

III. REPLY TO STATE BRIEF

In its Statement of the case, the State Brief asserts as a fact that "The report that the Parks and Wildlife Department was short $1,000,000.00 in BOR funds to make the acquisitions in question was determined to be erroneous." (State Brief, p. 3). This statement is clearly contrary to the finding of the Trial Court below that "the evidence at the hearing is sufficient to fully substantiate plaintiffs' contentions . . . that implementation of this project would virtually eliminate state funding for acquisition and development of outdoor recreational resources through 1975." (Pet. App. D, p. D-28).

In footnote 2 on page 6, the State's Brief contends that Petitioner Johnson's designation is "meaningless", which is contrary to the findings of the Trial Court on this point, to the provisions of the BOR Manual, and to the practices of the BOR. (See, e.g., Pet. App. D, pp. D25-D26.).

IV. SUMMARY

Wilson's Brief, State's Brief and the U.S. Memorandum all rely in large part upon statements which are not supported by the Record or which are contrary to the evidence and findings of the Trial Court. Respondents thereby hope to paint a picture of a legitimate acquisition of a state park which causes no injury to anyone. Petitioners would point

out that the illegitimacy of the proposed acquisition has already been determined by the Trial Court. Therefore, insofar as the standing question is concerned, this is not a case involving competing legal uses of federal funds. Rather, it involves an illegal use of federal funds which injures all of the Petitioners who would benefit from any legal expenditure of those funds.

V. CONCLUSION

Since it is clear, even from the briefs and memorandum in opposition, that the issue involved in this case is of such importance that this Court should decide that issue and resolve the conflicts created by the opinion of the United States Court of Appeals for the Fifth Circuit, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Glen E. Clover
Counsel for Petitioners

September, 1972.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petitioners' Reply to Respondents' Briefs and Memorandum in Opposition have been served upon Respondents by mailing same on September 13, 1972, to their attorneys of record as provided by Rule 33(1) and (2) (a), Supreme Court Rules, at the following addresses:

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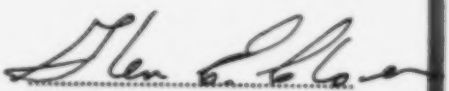

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